

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

32023

FILE: B-218975**DATE:** August 23, 1985**MATTER OF:** W. H. Smith Hardware Company**DIGEST:**

Bid on a total small business set-aside that does not commit the bidder to furnish items made by a small business concern is nonresponsive and must be rejected.

W. H. Smith Hardware Company protests the award of a contract for five-inch gate valves to Nightwine & Associates, Inc. under invitation for bids (IFB) No. DLA700-85-B-0292, which the Defense Logistics Agency issued as a total small business set-aside. The protester questions Nightwine's eligibility for award under a small business set-aside and complains that the agency did not follow proper procedures in making the award. The protester also questions Nightwine's status as a manufacturer under Department of Labor regulations implementing the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982). We sustain the protest because we find that Nightwine's bid was nonresponsive and therefore should not have been accepted for award.

When the agency opened bids and evaluated prices, Smith Hardware was the third lowest bidder. The firm filed a protest with the agency claiming that neither the lowest nor the second lowest bidder (each of which had represented itself to be a small business) was eligible for an award under a small business set-aside because both would supply foreign-manufactured valves.^{1/} The agency investigated

^{1/} The regulations of the Small Business Administration (SBA) provide that a bidder offering to supply a product that it does not manufacture is deemed to be a small business if, among other things, the product is manufactured by a small business in the United States. 13 C.F.R. § 121.3-8(c)(2)(i) (1985).

Smith's claim and rejected the low bid when it learned that the lowest bidder's valves would be manufactured in Japan, with only incidental work being done in this country. With respect to Nightwine, the second lowest bidder, however, the agency informed the protester that although Nightwine's valves would be manufactured partially in Italy, it appeared that enough of the manufacturing process would be performed in this country by a small business concern to qualify Nightwine as a small business. The agency therefore denied Smith's protest and awarded a contract to Nightwine. The agency has suspended performance of the contract, however, pending resolution of the protest to this Office.

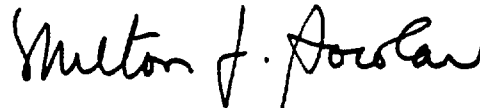
After receiving the notice that its agency protest had been denied, Smith filed a protest here, disputing the agency's conclusion that Nightwine qualified as a small business and questioning the evidence upon which that conclusion was based. Smith asked us to determine whether the agency had acted properly with respect to its protest and alleged that the agency improperly had awarded a contract to Nightwine prior to notifying Smith of the disposition of that protest.

We need not consider the various allegations that Smith has raised in its protest to this Office because, for the reason discussed below, we conclude that the agency should have rejected Nightwine's bid as nonresponsive. Our conclusion is based on our independent review of the record in this case rather than on the issues specifically addressed by the parties. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 91 (1975), 75-1 CPD ¶ 35.

Where a bid on a total small business set-aside fails to establish the legal obligation of the bidder to furnish items manufactured by a small business concern, the bid is nonresponsive and must be rejected. ATD-American Co., B-217290, Jan. 23, 1985, 85-1 CPD ¶ 91. The reason for this rule is that otherwise a small business contractor would be free to furnish supplies from either small or large manufacturers as its private business interests might dictate, thus defeating the purpose of the set-aside program. Id.

In this case, the solicitation stated in paragraph 137(b)(1) on page 22 that in addition to meeting the definition of "small business concern" under the criteria contained in the regulations of the SBA, a regular dealer submitting an offer in its own name must agree to furnish end items manufactured by small business concerns. Nightwine represented in paragraph K03 on page 27 of its bid that it is a regular dealer, but also indicated that not all supplies to be furnished would be manufactured by a small business concern in the United States, its possessions, or Puerto Rico. Thus, even though Nightwine itself may be a small business concern, the firm's bid was nonresponsive because it did not commit the firm to furnish items made by a small business concern as required by the solicitation and the SBA regulations. Since the responsiveness of a bid must be determined solely from the material available at bid opening, Basic Marine, Inc., B-215236, June 5, 1984, 84-1 CPD ¶ 603, Nightwine's postopening explanations may not be used to make the bid responsive.

We sustain the protest and recommend that the agency terminate the award to Nightwine and, if otherwise appropriate, award a contract to the protester.



Acting Comptroller General
of the United States